

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,804

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision of the Department of Social and Rehabilitation Services (SRS) revoking her day care home registration because her child had an abuse report substantiated against him. The issue is whether her son is present in the home.

FINDINGS OF FACT

1. The petitioner has been registered with SRS as a day care provider sine July of 1990. She currently has eight children in her care. Prior to the incident at issue, she had no complaints filed against her.
2. In late March of 1994, SRS received a complaint that two children in the petitioner's care had been sexually abused. SRS investigated that complaint and concluded on April 11, 1994, that the two children had been abused by the thirteen-year-old son of the petitioner. The petitioner was notified of that fact on April 15, 1994. While she disputes that he abused one child in the finding, she agrees that he did abuse the other.
3. On April 15, 1994, the petitioner was notified that SRS intended to revoke her day care registration as of May 15, 1994, because her thirteen-year-old son continued to reside in her home and had been identified as the perpetrator of child sexual abuse.
4. In response to this notification, the petitioner immediately moved her son to her mother's home and then, beginning May 15, 1994, made arrangements for her son to live with a friend, who lives nearby and happens to be a probation officer for sex offenders, during the school week, from Sunday evening to Friday evening. The boy routinely stops by the front of his house on his way to and from school to say hello but does not come into the house and occasionally comes by to visit his mother and stepfather in the evening after the day care has closed, but otherwise does not come to the house. After school is out for the summer, the boy will go to stay with his deceased father's family in Connecticut.
5. The Commissioner held a review hearing on May 23, 1994, at which the petitioner was present and testified as to the above facts. It was her contention that the children in her care were protected because

her son was kept from her home. She is trying to move her day care into a church center and hopes to have approval by July 5, 1994. At that time, she plans to have her son return home.

6. Following the review hearing, the Commissioner's designee notified the petitioner that SRS could not continue to approve her day care registration under the above circumstances because it had no power to enforce a restriction on her registration prohibiting her minor child from living in her house. In addition, the Commissioner felt that even if he could do so, it was not good policy to require the separation of children from their families as a condition to obtaining a day care home registration.

7. The petitioner appealed the above decision, and in further support of her position, introduced letters from parents of her day care home users attesting to the high quality of her care, the lack of alternatives available to the parents, and their belief that their children would be in a safe environment because her son is no longer in the home during day care hours. She further stated that her son is doing well in school and that he is on a waiting list to receive counseling in connection with his propensity to sexually abuse younger children, although she agreed that the boy would be better off living in his own home. The petitioner asked that no action be taken to revoke her day care home registration until she received licensing for the new day care center.

8. SRS is working with the petitioner to license a day care at a facility outside her home. However, they continue to take the position that they cannot feel that the children in the petitioner's care are safe from her son so long as she has custody of him and the legal responsibility to care for him. As further example, SRS cited the potential need for the child to stay in the home if he should become sick, a contention with which the petitioner agreed. SRS agreed that it had the power to waive the violation of the regulation but maintained that its doing so in past cases, re-abuse of the children occurred. As a result, a determination had been made that no further waivers would be granted allowing founded abusers to remain in the household, even with restrictions. SRS reiterated at the hearing that it has no way to monitor a restriction on keeping a minor household member out of the day care home and had no wish to place such a restriction on the home because it puts a strain on family relationships, a situation which SRS wishes to avoid.

ORDER

The Department's decision is affirmed.

REASONS

Two questions are presented by this appeal. The first is whether the petitioner is in violation of a program regulation and, if a violation is found, the second is whether the Department abused its discretion in refusing to waive the violation and to proceed with revocation.

On April 1, 1993, SRS, pursuant to the authorizing statute at 33 V.S.A. § 2595(3), promulgated regulations

governing registered day care homes which provide, in pertinent part, as follows:

...

4. The following persons may not operate, reside at, be employed at or be present at a Family Day Care Home:

...

b. adults or children who have had report of abuse or neglect substantiated against them.

Section 1 - ADMINISTRATION

Regulations for Family Day Care Homes April 1, 1993

The petitioner claims that she is not in violation of that regulation because as soon as she was notified of the abuse substantiation regarding her thirteen-year-old son, she made arrangements for him to reside elsewhere. The Department contends that in the ordinary course of events, the boy would be living with his mother and stepfather and that his absence is completely contrived to meet regulations. The Department believes that the boy legally still resides with his parents, regardless of any temporary placements.

There is no question that this situation has been contrived to meet the requirements of the regulations. The petitioner admits as much herself. The petitioner also admits that as a conscientious parent, she would take her child back as a daily resident if any emergency should occur, such as illness or a breakdown in her present arrangements. She further admits that the boy continues to stop by the front of her house after school in order to visit with her and her husband and stays at the house on weekends.

Given the above facts, it must be concluded that the boy still resides in his parents' home even though he may be temporarily absent part of the time. Residence implies the place of a person's main attachment, not where he might be at the moment. A child's residence under law is usually that of his parents. See, e.g., 33 V.S.A. § 5701 (Interstate Compact on Juveniles); 16 V.S.A. § 1075(a) (Education Laws). So long as the petitioner and her husband are his parents and are responsible for that child's care it is reasonable to find that he resides in their household. Therefore, the Department's finding that the boy is a resident in their household must be found to be accurate.

As the child resides in the petitioner's home and is a founded perpetrator of sexual abuse of children, the regulation cited above has clearly been violated with regard to the petitioner's home day care registration. However, the Department's regulations specifically give it the power to waive violations under certain circumstances:

16. The Commissioner, upon request in an individual case, and in his or her discretion, may grant a variance to a regulation. A variance may be granted when in unique and exceptional circumstances literal application of a regulation will result in an unnecessary hardship, and the intent of the regulation can be achieved by other means.

17. The Division may attach conditions to a Registration when circumstances warrant.

18. A Variance Review Panel may be established by the Commissioner to assist in consideration of variance requests. The burden of establishing that a variance should be granted rests with the applicant.

Section VI, Id.

The petitioner argues that she should receive a waiver and have her registration conditioned to keep her child out of the day care home during her hours of operation. She believes her efforts to keep him from the home have thus far proven to be successful and that the children in her care are no longer in danger. She further argues that her day care home is sorely needed by her clients and that they are aware of the situation and continue to have confidence in her care. Finally, she asks only that the waiver be granted temporarily because she is attempting to move her day care operation into a licensed facility.

These arguments were heard and considered by a representative of the Commissioner who rejected the petitioner's request for a variance. The Commissioner's reasons included the seriousness of the potential harm and the Department's inability to effectively monitor for the presence of individuals in registered day care homes, even for a short period of time. The Department does not disagree that the petitioner provides a needed and valuable service to the children she cares for or that she is capable of providing quality services. They are working with her to obtain licensing for the new day care facility which she will head.

The Board has held in the past that the statute at 3 V.S.A. § 814 gives the Department the discretion to revoke a day care home registration certificate "where a

violation of the regulations occurs which could affect the safety, health or well-being of a child." See Fair Hearing 10,013. The Board will only overturn the Department's decision where the use of that discretion was arbitrary or capricious. There is nothing in the Department's decision here which indicates that it was unreasonable. A serious problem was found with an older child residing in this household abusing a younger child or children. While the petitioner has taken remarkable measures to prevent its reoccurrence in the future, it can not be said that the Department's lack of confidence in those guarantees, particularly given its past negative experience in this area, is not a rational position. Neither can it be found that the Department's reluctance to place conditions on a registration which require the separation of parent and child is not a reasonable position.

As the Department has the authority to revoke for violations which affect the safety, health and well-being of children, and as it has reasonably concluded that the violation of this regulation could affect the safety of children, its revocation action should be upheld. The petitioner should understand (and it appears that she does) that this decision is no reflection on her capabilities as a day care provider. Her remedy in this matter is not to move her child out of her home but rather to move her day care out, an undertaking which is currently in progress.

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